CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA



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| In re: Request for Regulatory Determination filed by Tariq Bilal Mustafa concerning the Department of Corrections California Medical Facility's Operations Plan Nos. 6 (Inmate Personal Property), 35A (Cell/Ward Furnishings and Wing Procedures), 35B (Cell Standards/CMF-South) and 100 (Inmate Savings and Trust Accounts)[1] | 1988 OAL Determination No. 13<br>[Docket No. 87-019]<br>August 31, 1988<br>Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2 |

Determination by:

JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the Department of Corrections California Medical Facility's "operations plans" limiting inmates' personal property, concerning cell furnishings, and governing inmate financial transactions are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

Because five specific sections of the operations plan concerning inmate personal property appear virtually identical to Administrative Manual provisions that have been found by three courts to violate the Administrative Procedure Act, OAL concludes that these five sections are "regulations." The Office of Administrative Law further concludes, however, that both (1) the remainder of the operations plan concerning inmate property and (2) the whole of the other two operations plans are not "regulations" required to be adopted pursuant to the Administrative Procedure Act.

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THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether the Department of Corrections ("Department") California Medical Facility's ("CMF") Operations Plan Nos. 6 (Inmate Personal Property), 35A (Cell/Ward Furnishings and Wing Procedures), 35B (Cell Standards/CMF-South), and 100 (Inmate Savings and Trust Accounts) are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).[4]

THE DECISION [5,6,7,8]

The Office of Administrative Law finds that:

I. Operations Plan No. 6, Part VI., sections M. (Handicraft), N. (Legal Materials), P. (Organization Membership Cards), S. (Inmate Property Complaints and Appeal Process), and T. (Board of Control Claims)--which appear to have been adopted in conformity with judicially invalidated Administrative Manual sections 4612, 4614, 4615, 4640, and 4641--are (1) subject to the requirements of the Administrative Procedure Act (APA),[9] (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a).[10]

II. The remainder of Operations Plan No. 6 and all of Operations Plans Nos. 35A, 35B,[11] and 100 are (1) not "regulations" and are (2) not subject to the requirements of the APA.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

California's first, and for many years only, prison was located at San Quentin. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.[12] The Legislature has thus entrusted the Director of Corrections with a "difficult and sensitive job":[13]

> "[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ."[14]

Authority [15]

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Penal Code section 5058, subdivision (a), currently provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

In any event, the APA applies to all state agencies, except those "in the judicial or legislative departments." Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.

General Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory, regulatory, and case law history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

Background: the Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations (CCR).

Dramatic changes to this policy have occurred in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"[16] by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations. "The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."[17] Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.

Before turning to a brief overview of the structure of the rules and regulations of the Department, we note that the underlying legal question presented by this Request for Determination is whether rules issued by wardens and superintendents of particular institutions must be adopted pursuant to the APA. Given the fact that this seems to be a question of first impression, we will go into some detail in describing its complex background.

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," currently about 200 CCR pages.

The second tier consists of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules. The Manuals are the Classification Manual, the Departmental Administrative Manual, the Case Records Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, and the Parole Procedures Manual-Felon.[18,19] Manuals are updated by "Administrative Bulletins," which typically include replacement pages for modified manual provisions.

Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations

is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.][20]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

"[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals . . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

"While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall be operated in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals."

"(a) Each institution . . . shall establish local procedures for all major program operations."

. . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy. . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations.[21] Since the documents under review in this proceeding bear the title "operations plans," we will generally use that term.

The third tier of the regulatory scheme thus consists of hundreds (perhaps thousands) of these "operations plans", drafted by individual wardens and superintendents and approved by the Director. These plans often repeat parts of statutes, Director's Rules, and procedural manuals. The record does not reveal the exact number of plans, but we note that the CMF numbering system clearly indicates that CMF alone has at least 100 plans, and CMF is but one of 19 major institutions.[22,23]

These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subdivision (c) specifically provides:

> "Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Another duly-adopted regulation ("first tier enactment") explicitly instructs wardens to prepare certain inmate property rules. Title 15, CCR, Section 3190 provides in part:

> "(a) Wardens and superintendents shall establish a list of personal property items and the maximum amount of such items an inmate may have in his or her possession within the institution."
>
> "(b) The combined volume of state-issued and allowable personal property items shall not exceed six cubic feet. In addition, institutions may allow any two of the following items: One television receiver, one musical instrument, one radio, one recorded tape/disk playback unit, one typewriter."
>
> . . . . [Emphasis added.]

Another duly-adopted regulation directly addresses the question of legal materials. Title 15, CCR, section 3161 provides:

> "Inmate personally-owned law books and papers will be limited by institution procedures to the availability of space for personal property in the inmate's quarters. Books and papers in excess of this limitation may be donated to the library, sent home, or destroyed, whichever the inmate prefers."

Section 4612 ("Legal Material") of the Department's Administrative Manual (a "second tier" document) provides:

> "Legal materials are subject to the six cubic foot limit. The inmate's own trial transcripts, legal pleadings, legal research notes and attorney-client communications in excess of the six cu.ft. limit shall be retained at the inmate's request in his/her unissued personal property. Inmates shall be permitted access to stored legal materials for the purpose of exchanging such papers with those retained in the inmates' living quarters no less than two times per week. Personally owned law books/pamphlets, or copies of published court opinions shall not be stored. Such material shall be donated to the library, sent to a person designated by the inmate or destroyed, whichever the inmate prefers."

Operations Plan No. 6, Article VI, Section N. (a "third tier" document) states in part:

> "Legal materials are subject to the six cubic foot personal property limit. The inmate's own trial transcripts, legal pleadings, legal personal notes, and attorney/client communications in excess of the six cubic foot limit shall be retained at the inmate's request in his un-issued personal property, stored in an area within the Program Housing Unit. . . . Inmates shall be permitted access to these materials for the purpose of exchanging such papers with those retained in the inmate's living quarters at least twice weekly. . . . Personally owned books/pamphlets or copies of published court opinions shall not be stored. Such materials shall be donated to the library, sent to a person designated by the inmate, or destroyed, whichever the inmate prefers. . . ."

Background: Legislative and Judicial Actions

In the 1970's, efforts were made to require the Department[24] to follow APA procedures in adopting its regulations. The first effort to attain this goal through the legislative process passed the Assembly in 1971, but failed to obtain the approval of the Senate Finance Committee.[25] A two-pronged effort followed. Another bill was introduced;[26] the Sacramento Superior Court was asked to order the Department to follow APA procedures. Both efforts initially succeeded. The court ordered the Department to comply with the APA; both houses of the Legislature passed the bill. However, while the bill was on Governor Reagan's desk in 1973, the California Court of Appeal overturned the trial court decision.[27] Shortly after the appellate decision, the Governor vetoed the bill.

In 1975, a third bill passed the Legislature and was approved by Governor Brown.[28] In passing this third bill, the Legislature set a deadline for the Department to place its regulations in the APA:

> "It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.][29]

Prior to the July 1, 1976 deadline, the Department adopted the Director's Rules, the first tier of the regulatory scheme, into the CCR. In subsequent years, court decisions have struck down portions of the second tier--the Classification Manual and parts of the Administrative Manual --for failure to comply with APA requirements.[30]

Did the Legislature intend, however, that third tier materials, the operations plans issued by particular wardens to apply to particular institutions, be subject to APA procedures? We conclude that the answer to this question is "no." In reaching this conclusion, we rely primarily on two factors: (1) the long-established legal line of demarcation between "the rules of regulations of the Department" and rules applying only to one particular institution and (2) the legally absurd consequences of deeming the APA to apply to local rules.

(1) Line of demarcation between statewide and institutional rules.

California courts have long distinguished between statewide rules and rules applying solely to one prison.[31] In American Friends Service Committee v. Procunier[32], the case which overturned a trial court order directing the Department to adopt its "rules and regulations" pursuant to the APA, the California Court of Appeal stated:

> "The rules and regulations of the Department are promulgated by the Director and are distinguished from the institutional rules enacted by each warden of the particular institution affected." [Emphasis added.][33]

Procunier is especially significant because it was this case which the Legislature in essence overturned by adopting the 1975 amendment to Penal Code section 5058 which made the Department subject to the APA. The controversy was over whether or not the Director's Rules, the rules "promulgated by the Director" (emphasis added) were subject to APA requirements.

This dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as Hillery v. Enomoto (1983). The Hillery court, though forcefully rejecting arguments that Chapter 4600 did not violate the APA, carefully noted:

> "This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to devise particular rules applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions were exempted from certain provisions of the guidelines involved here, the guidelines at issue were (1) adopted by the Director of the Department of Corrections and (2) are of general applicability." [Emphasis added.][34]

(2) Legally Absurd Consequences

Requiring third tier ("local") rules to be adopted pursuant to the APA would have absurd consequences. Wardens would have to go through the public notice and comment process prior to, for instance, establishing or modifying rules setting hours during which meals are served! While, as noted in prior Determinations,[35] departmental decisions on statewide matters often have major fiscal and policy consequences, local administrative decisions are, for the most part,[36] much less significant. Requiring full-bore APA procedures for these myriad decisions would seriously undercut the individual warden's ability to carry out his or her legal duties. Requiring the Department to adopt statewide rules pursuant to the APA was a controversial legislative policy decision, from which many legislators dissented. Had the members been informed that local rules would also be subject to APA adoption requirements, it is likely the bill would not have passed.

Background: Inmate Property Litigation; This Specific Request

In January 1982, the Director issued an Admnistrative Bulletin, containing major revisions to the Department's Administrative Manual, Chapter 4600, which governs the types and amounts of personal property prison inmates in California are allowed to possess. APA rulemaking procedures were not followed. The new rules were to be implemented in all California prisons by July 31, 1982.

In early 1982, four inmates at San Quentin State Prison filed a lawsuit in federal court in San Francisco to enjoin the Department from enforcing the revised Chapter 4600, alleging

that restrictions on possession of legal materials violated their constitutional rights. In June 1982, the federal trial court enjoined the Department from enforcing the new rules at San Quentin. Avoiding the constitutional question of whether--by limiting possession of legal materials--the new rules impermissibly abridged the inmates' Fourteenth Amendment right of access to the courts, the trial court instead found that chapter 4600 violated the California APA.

In June 1983, the U.S. Court of Appeals for the Ninth Circuit in Hillery v. Rushen[37], affirmed the lower court's ruling that Chapter 4600 was invalid "because, contrary to the requirements of section 5058(a) of the California Penal Code, [the Department] promulgated it without following the procedures mandated by the [California] APA."[38] The Hillery court further held "that the district court properly enjoined [the Department] from enforcing revised Chapter 4600 until they complied with the requirements of the California APA."[39]

In January 1984, Hillery was effectively overturned by the U.S. Supreme Court in the precedent-shattering case of Pennhurst State School & Hospital v. Halderman,[40] which held in an unrelated proceeding that the Eleventh Amendment to the U. S. Constitution prohibits federal courts from enjoining the conduct of state officials on the basis of state law.

In early 1984, San Quentin inmates brought a class action habeas corpus petition in Marin Superior Court, again attacking chapter 4600 and its implementation at San Quentin. In October 1984, the court found in In re Alcala[41] that the Department had

> "failed to promulgate the regulations contained in Chapter 4600 of the Department of Corrections' Administrative Manual (Chapter 4600) pursuant to the provisions of the [APA] and that a substantial part of the regulations contained in San Quentin Institution Procedure No. 215 (I.P. 215) is based on Chapter 4600. The Court also finds that this action is appropriate for class relief as the challenged regulations are generally applicable to the class of all prisoners in institutions governed by the Department of Corrections."

In this October 1984 order, the Alcala court went on to enjoin the Department from enforcing either chapter 4600 or I.P. 415 at San Quentin, instructed the warden of San Quentin to revise I.P. 451 "independent of any consideration of the terms of Chapter 4600," and announced its intention of extending the injunction to cover "all institutions run by the Department." In November 1984, the Department appealed the trial court's October order. In December 1984, the Alcala court extended the order to "all institutions". In September 1985, at the request of the Department, the Court

of Appeal dismissed the appeal of the October order. In May 1988, following agreement on a revised version of I.P. 415, the Alcala parties agreed to dismiss all but one part of the action without prejudice. In June 1988, the court ruled in favor of the inmates on an issue involving possession and wearing of civilian clothing.

In 1985, the reasoning of Hillery--the 1983 federal appeals court case--was resurrected and followed by the California Court of Appeal Faunce v. Denton.[42] In that case, prisoners at Folsom State Prison filed a lawsuit seeking to enjoin the enforcement of the same Chapter 4600 that was challenged in the Hillery case. The prisoners particularly objected to "that part of Chapter 4600 which limits the amount of property each prisoner may possess in his or her cell to six cubic feet . . . ."[43]

In its decision, the Faunce court noted that on March 6, 1985, the Department successfully amended Title 15 of the California Code of Regulations, section 3190 by adopting an emergency regulation which incorporated the six cubic feet limit on inmates' personal property. The court stated, however, that "the Department still has not adopted chapter 4600 in accordance with the [APA]. . . . Chapter 4600 goes much further, setting forth in great detail the particular items of personal property which are subject to the limitation, including books and other such materials. The Department may not rely upon amended section 3190 to enforce chapter 4600. . . ."[44] [Emphasis added.]

On October 20, 1987, Tariq B. Mustafa ("Requester"), while an inmate at CMF, filed a Request for Determination[45] with OAL.

The California Medical Facility ("CMF"), located in Vacaville, California, is an institution established under the jurisdiction of the Department. Section 6102 of the Penal Code states:

> "The primary purpose of the medical facility shall be the receiving, segregation, confinement, treatment and care of males under the custody of the [Department] or any agency thereof who are any of the following:
>
> (a) Mentally disordered.
>
> (b) Developmentally disabled.
>
> (c) Addicted to the use of controlled substances.

(d) Suffering from any other chronic disease or condition." [Emphasis added.]

The Department describes CMF as

> "the largest institution in the system; at the present its population exceeds 8,000 inmates. . . . CMF is a multiplex facility which has been expanded several times since it moved to Vacaville in 1955. It is comprised of a combination of cells and dormitories, housing a variety of programs including a Reception Center, Medical and Psychiatric Hospital and Long-Term Care Facilities, as well as a General Population and a Secured Housing Unit. Custody Levels range from Level I through Level IV."

This Request concerns the Department's California Medical Facility Operations Plan Nos. 6 (Inmate Personal Property), 35A (Cell/Ward Furnishings and Wing Procedures), 35B (Cell Standards/CMF-South), and 100 (Inmate Savings and Trust Accounts). The Requester alleges that Operations Plan Nos. 6, 35A and 35B set "forth detailed provisions governing the amount and type of personal property which inmates housed at CMF-South may have in their cells, not limited to but <u>including legal material</u>," (emphasis added) which are not only rules and regulations in violation of APA requirements, but have also been "determined invalid and unenforceable under <u>Faunce v. Denton</u> [citation omitted]." The Requester further alleges that Operations Plan No. 100 and the addendum to No. 100, dated September 23, 1987, are also in violation of the APA.

OPERATIONS PLAN NO. 6 contains, inter alia, an authorized list of inmate personal property items, the procedures for ordering, receiving, or acquiring any personal property from a correspondent or vendor, medical orders, educational orders, musical instruments, orders from approved catalogs, restrictions and limitations, delivery of property, disposition and storage of personal property. Plan No. 6 states that its purpose is

> "To establish a list of personal property items which may be obtained <u>by CMF inmates (all units)</u>, and kept in their possession. To govern the acquisition, possession, and disposition of personal property by inmates while providing a means of processing inmate's personal property."[46] [Emphasis added.]

OPERATIONS PLAN NO. 35A contains, inter alia, an approved list of personal property items which are allowed in all general population housing units, wings and wards, and procedures for the daily operation for all general population wings, i.e., use of game rooms, sanitation and inspections of

the wings, unlocks, housekeeping, and use of showers. No. 35A defines its purpose as:

> "1. To identify authorized cell/ward furnishings in general population housing.
> 2. To provide a procedure for the routine operation of general population housing units."[47] [Emphasis added.]

OPERATIONS PLAN NO. 35B governs the cell standards at CMF-South, Complex A and Complex B. Plan No. 35B contains, inter alia, an approved list of personal property items for Complex A and another list for Complex B, procedures for unlocks, day rooms, sanitation and inspection, and housekeeping. Plan No. 35B states its purpose as:

> "1. To provide an expedient reference source and establish guidelines regarding cell/dorm standards.
> 2. To standardize the amount and type of furnishings permitted in the living areas of the general population units."[48]

OPERATIONS PLAN NO. 100 contains, inter alia, a list of approved withdrawal orders, i.e., personal check request, postage, educational purchases, religious gifts, hobby purchases, etc., the procedures for withdrawing funds from a trust account by an inmate for investing purposes, restrictions and limitations for withdrawals and investments, and the procedure for purchasing U.S. savings bonds. Plan No. 100 states that its purpose is:

> "1. To provide inmates with large sums of money in their trust account the opportunity to place part of their funds in a savings account and receive the interest therefrom.
>
> "2. To control and safeguard inmate funds."[49] [Emphasis added.]

In the matter before us, Mr. Mustafa applied to enroll in an accounting correspondence course--such an accounting course was not offered at CMF--and requested permission to enter into a contract with the private correspondence school to make monthly payments until the tuition was paid. Mr. Mustafa's request was approved by the educational supervisor, but it was subsequently denied on the grounds that inmates generally could not enter into a contract where installment payments were to be made. The addendum to Operations Plan No. 100, dated September 23, 1987, was provided as the ground for denial. CMF found that the situation of paying for tuition by installment payments had never arisen before and therefore issued this addendum and applied it to Mr. Mustafa retroactively.

The addendum to Plan No. 100, dated September 23, 1987, to which the Requester strenuously objects, states:

> "No inmate shall be allowed to enter into any contract where payments are to be made weekly, bi-monthly or monthly, while incarcerated. This is for the protection of the inmate, the company, and the institution. There is no guarantee by the institution that the inmate will continue to have funds available for such payments. The institution will not guarantee such payments, therefore, the institution will not allow any such undertaking by any and all inmates." [Emphasis added.]

On July 5, 1988, the Department filed a Response to the Request with OAL. In addition to other arguments (which we address in note 45), the Department asserts that

> "These Operations Plans provide a convenient collection of applicable statutes, court cases, regulations from the [CCR], internal management procedures, forms, as well as local rules which are not of 'general application.' These local rules include criteria for the acquisition, possession and disposition of personal property and funds to meet the unique situation at CMF and its sub-areas. The [Department] generally denies all the allegations made by the Requestor in his Request for Determination and specifically denies that the subject rules constitute an exercise of quasi-legislative power by a state agency."[50]

## II. DISPOSITIVE ISSUES

There are two main issues before us:[51]

(1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or

> standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> " (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

> First, is the informal rule either
>
> - a rule or standard of general application or
> - a modification or supplement to such a rule?
>
> Second, has the informal rule been adopted by the agency to either
>
> - implement, interpret, or make specific the law enforced or administered by the agency or
> - govern the agency's procedure?

The challenged rules (Operations Plans Nos. 6, 35A, 35B, and 100) may be divided into two categories. The first category (parts of No. 6) consists of "rules" the validity of which has already been litigated--no less than three times. The second category (everything else) consists of material that to our knowledge has not been specifically addressed by a court. We will address the first category first.

PREVIOUSLY INVALIDATED RULES

As noted above, both the Hillery and the Faunce court struck down chapter 4600 of the Administrative Manual as violative of the APA. The question thus arises: can an individual warden subsequently re-issue parts of chapter 4600 without violating the APA? This was the question faced by the Alcala

court, as noted above. The Alcala court ruled as follows, in an order dated December 20, 1984:

> "IT IS HEREBY ORDERED that respondents, their agents or employees are hereby enjoined from enforcing any of the provisions contained in Chapter 4600 of the Department of Corrections' Admnistrative Manual, or any institutional procedures or parts thereof based upon Chapter 4600 at any of the facilities under its jurisdiction; provided that respondents may continue to enforce Chapter 4600 for thirty days if within that time the warden or superintendent at each facility reviews and revises the institution order governing the possession of property independent of any consideration of terms of Chapter 4600." [Emphasis added.]

We find the Alcala court's reasoning persuasive. We acknowledge that there appears to be a controversy over whether actions by the court in 1988 concerning settlement of the basic dispute at San Quentin may have had the result of terminating the injunction binding the other institutions. Assuming arguendo that the injunction is no longer in force, we are nonetheless faced with the necessity of resolving the question of the legality of the Chapter 4600 "clones" now under review. Applying the principle of stare decisis,[52] we find no compelling reason to depart from the even-handed disposition rendered by the Alcala court.

Indeed, several factors lead us to conclude that we should follow Alcala:

> (1) The Department lists the Alcala injunction as a "reference" citation for Title 15, CCR, section 3190, a regulation concerning local inmate property rules. The "note" following the regulatory text reads:
>
> > "Authority Cited: Section 5058, Penal Code. Reference: Sections 2601(c)(2) and 5054, Penal Code; and in re Alcala, Marin County Superior Court, No. 117925, December 20, 1984." [Emphasis added.][53]
>
> (2) based on the record before us, chapter 4600 has been neither rescinded nor codified by the Department. The Administrative Manual pages comprising chapter 4600 have not been removed from the Manual. Neither has an Adminstrative Bulletin been issued instructing departmental staff to disregard chapter 4600. Further, Chapter 4600 has not been adopted pursuant to the APA.
>
> (3) Based upon language contained in the CCR and in the Administrative Manual, individual wardens are under clear instructions to conform local rules closely to

departmental procedural manuals, including chapter 4600 of the Administrative Manual.

(4) The record does not confirm that institutions under the Department's jurisdiction have complied with the 1984 Alcala order that they "revise[] [each] institution order governing the possession of property independent of any consideration of the terms of Chapter 4600."

(5) As demonstrated in note 54,[54] sections M, N, P, S and T, are virtually identical to invalidated Administrative Manual sections 4612, 4614, 4615, 4640, and 4641.[55] Five months after the Alcala order quoted above, the Faunce court--apparently unaware of the Alcala order--struck down chapter 4600 again. The virtual identity of content between 4600 and the CMF OP's, we conclude, raises serious questions as to whether the Department is in compliance with Faunce, which enjoined the Director of Corrections from implementing the provisions of chapter 4600 at Folsom prison.

OPERATIONS PLAN PROVISIONS NOT PREVIOUSLY INVALIDATED

The more difficult of the two issues facing us here is whether or not the portions of the challenged operations plans which have not been previously invalidated are "regulations," that is, whether they must be adopted pursuant to the APA. The key question is whether local prison rules are "standards of general application."
In the abstract, for an informal agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[56] We have previously found that rules applying solely to particular geographical areas of the state were nonetheless "of general application" because the rules applied across the board to all members of "an open class."[57] In the context of rules applying to prisoners, the courts have articulated a narrower standard.

In Stoneham v. Rushen I (1982),[58] the California Court of Appeal held that a "comprehensive" inmate classification scheme constituted "a rule of general application significantly affecting the male prison population in the custody of the Department [in California]." (Emphases added.)[59,60] Three other published opinions have followed Stoneham I.[61]

THE ISSUE IS THUS WHETHER WE SHOULD GO BEYOND THE STANDARD ARTICULATED IN STONEHAM, THAT IS, WHETHER WE SHOULD CONCLUDE THAT NOT ONLY STATEWIDE RULES ARE OF "GENERAL" APPLICATION IN THE PRISON CONTEXT, BUT ALSO RULES PERTAINING SOLELY TO ONE INSTITUTION. For the reasons listed below, and in the

absence of a clear expression of legislative intent to the contrary, we decline to go beyond what the courts have held.

(1) As noted above, we conclude that the Legislature did not originally intend that rules pertaining solely to one institution be adopted pursuant to the APA.

(2) Requiring the rules to be formally adopted would not only trivialize the APA rulemaking process, but would also needlessly complicate the already difficult task of prison administration.[62] Flexibility is needed at the institutional level to deal with matters such as sudden population increases.[63]

(3) A duly adopted regulation, title 15 CCR section 3190, specificially authorizes wardens to adopt institutional rules. The requirement that institutional rules must be reviewed by the Director provides some degree of protection against undesirable local rules.

(4) Inmates who object to the content of particular institutional rules may file grievances within the prison system, and if relief is not forthcoming there, may easily and without obtaining legal representation petition for habeas corpus relief in superior court. These simple, no-cost procedures stand in sharp contrast to the complexity and expense faced by a wage earner, small businessperson, school district, etc., when the decision is made to litigate a troublesome informal rule. There is thus, in the prison context, less need for imposing stringent public notice and comment requirements. An inmate would likely have small chance of success in filing a grievance against a statewide rule. Since local rules are subject to review by the Director, however, it is possible that a grievance directed at a local rule might be granted upon review by the Director.

(5) Most critical prison rules are statewide in nature and thus subject to APA requirements. Courts will require individual institutions to conform to duly adopted statewide rules, thus protecting affected parties from inconsistent local rules.[64]

(6) California prisons have recently experienced a substantial increase in the inmate population. Many new staff members have been hired to deal with the inmate influx. Thus, individual prisons are in particular need at this time of rules that inform both inmates and staff how recurring problems are to be resolved.

WE THEREFORE CONCLUDE THAT THE ABOVE-NOTED SECTIONS OF OPERATIONS PLAN NO. 6 ARE "REGULATIONS" AS DEFINED IN

GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), BUT THAT THE REMAINDER OF THE CHALLENGED PLANS ARE NOT "REGULATIONS."

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[65]

The Department contends that several portions of the challenged Operations Plans fall within the "internal management" exception. We need address this issue only in regard to the five sections listed below that have been found to be regulatory.

As discussed above, Operations Plan No. 6, Part VI, sections M, N, P, S, and T have been found to be regulatory because they substantively repeat provisions of Chapter 4600 of the Administrative Manual, which has been judicially declared to violate the APA. Small portions of these sections, however, fall within the internal management exception, or are nonregulatory or restatements of existing law. These portions are identified by double underlining in note 54 where the text of these sections is printed in full. None of the other recognized APA exceptions listed in note 65 apply to the five regulatory sections of Operations Plan No. 6.

III. CONCLUSION

For the reasons set forth above, OAL finds:

I. that sections M, N, P, S, and T of part VI of CMF Operations Plan No. 6 (1) are subject to the requirements of the Administrative Procedure Act (APA), (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a).

II. that the balance of the challenged rules are (1) not "regulations" and are (1) not subject to the APA.

DATE: August 31, 1988

HERBERT F. BOLZ
Coordinating Attorney

DEBRA M. CORNEZ
Staff Counsel

Rulemaking and Regulatory
Determinations Unit[66]

Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, ATSS 8-473-6225
*Telecopier No. (916) 323-6826*

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[1] This Request for Determination was filed by Tariq Bilal Mustafa (aka Wendell H. Dycus), C-92259, G-116, P. O. Box 689, Soledad, CA 93960 (housed at the California Medical Facility at the time this Request was filed). The Department of Corrections was represented by Marc D. Remis, Staff Counsel, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

[2] The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

> Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and

selection mechanism.")

Readers aware of additional "underground regulations" decisions--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 65, infra).

3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subdivision (a) provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

4 Government Code section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the

Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, no public comments were submitted to OAL. The Department submitted a Response to the Request for Determination which was considered in making this Determination.

7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 1.

9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

10 Except for a small number of provisions that are either nonregulatory or are restatements of existing statutes, regulations, or case law. See double-underlined portions of note 54.

11 But see note 54, infra, which sets out relatively minor features common to both O.P. No. 35B and section 4611.

12 Penal Code section 5000.

13 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.

14 Penal Code section 5054.

15 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

16 California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

17 Id.

18 As listed in Administrative Manual, chapter 200, section 240, effective 5-18-84.

19 The Administrative Manual is 1494 pages in length; the Manuals in toto take up about five to six feet of shelf space.

20 This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the above quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876. (The uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058.) As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. SPB ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.

21 See Administrative Manual section 242(d).

22 The operations plans for all institutions appear to be quite lengthy in toto. The three plans at issue in this proceeding total 58 pages in length. Operations Plan No. 6 (dated January 1987) consists of sixteen pages, plus eighteen pages of forms and lists of approved personal property and five pages of addendums to No. 6 (dated April 1987); No. 35A (dated February 1987) consists of five pages; No. 35B (dated March 1987) consists of eight pages; and No. 100 (dated August 1987) consists of ten pages, plus one addendum page (dated September 23, 1987).

23 The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise "Operations Manual", and (3) eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.

24 The three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of the legislation.

25 AB 1270(Sieroty/1971).

26 SB 1088(Nejedly/1973).

27 American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

28 AB 1282(Sieroty/1975).

29 Section 3 of Statutes of 1975, chapter 1160, page 2876.

30 These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement. Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5, warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Admistrative Procedure Act process . . . ."

31 See In re Allison (1967) 66 Cal.2d 294, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); In re Harrell (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); In re Boag (1973) 35 Cal.App.3d 866, 870 n.1, 111 Cal.Rptr. 226, 227 n.1 (contrasts "local" with "departmental" rules). See also Department of Corrections, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections and of the particular institution. . . . ")

32 (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

33 Id., 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.

34 720 F.2d, 1135-36, n.2.

35 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-82; typewritten version, p. 11 (**how inmates are classified**); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, pp. 1685-1686; typewritten version, pp. 4-5 (**internal administrative grievance procedure**).

36 We recognize that the local rule banning installment contracts implicates the public interest in inmate rehabilitation, in that the Requester was attempting to enroll in an accounting course on the installment plan. We also recognize that there appears to be nothing "unique" to CMF indicating that such a rule is needed there, rather than statewide. These considerations, however, are not sufficient to change our disposition of this matter.

37 (9th Cir. 1983) 720 F.2d 1132.

38 Id., 720 F.2d at p. 1134.

39 Id., 720 F.2d at. p. 1140.

40 (1984) 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67.

41 Marin County Superior Court, Case No. 117925.

42 (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

43 Id., 167 Cal.App.3d at p. 194, 213 Cal.Rptr. at p. 123.

44 Id., 167 Cal.App.3d at p. 197, 213 Cal.Rptr. at p. 126.

45 In its Response, the Department argues that

"OAL lacks jurisdiction to issue a Determination pursuant to this Request since the Requestor has failed to meet the requirements of Title 1, CCR, Section 122(c). Specifically, the Requestor has failed to perform the following jurisdictional requirement:

> (c) Any person who submits to the office a request for determination, shall first transmit a copy of the request for determination . . . to the head of the state agency whose rule is the subject of the request. . . ." [Emphasis added by the Department.]

The Department alleges that it never received a copy of the Request in the manner required by section 122, subdivision (c). The Department bases its argument on the fact that the transmittal declaration submitted by the Requester at the time of filing the Request names the Office of Administrative Law as the state agency whose rule is the subject of the request. This mistake by the Requester was promptly discovered by OAL and brought to the Requester's attention as not having completely satisfied the filing requirements for a Request. (See letter of October 9, 1987, addressed to the Requester, with copies sent to the Director of Corrections and four additional Department officers.) In a letter dated October 20, 1987, the Requester responded to OAL's notice of noncompliance:

> "In response to your letter addressed to me dated 10/9/87 (Attached), this letter is a verification that I had served notice of all copies contain [sic] in my original request before the [OAL]; upon the Director of Corrections on [or] about the 27th day of September, within the requirements of Title 1, [CCR] Section 122 and I Tariq Bilal Mustafa, declare under the penalty of perjury that all the above is true and factual as to matters stated!"

Finding all the pertinent filing requirements satisfied, OAL then sent Mr. Mustafa a "Notice of Acceptance" letter and a subsequent letter, dated February 19, 1988, informing him of the filing deadlines for public comment and agency comment. Copies of both of these letters were sent, not only to the Director of Corrections, but also to three other pertinent members of his staff. The Department was put on notice at least three times: (1) Notice of Acceptance letter, dated October 27, 1987, (2) letter notifying Requester of the newly set timelines, dated February 19, 1988, and (3) Notice of Active Consideration letter, dated May 20, 1988. In addition to these three letters, OAL also directly sent the Director of Corrections a "Notification Re Agency Response" letter, dated May 20, 1988, regarding this Request for Determination. The Department therefore had actual notice of this Request.

On or about July 1, 1988, OAL received a telephone request by the Department for a copy of the Request. The copy was received by the Department "on July 2, 1988, one business day before the Department's Response was due to OAL." (On or about July 7, 1988, pursuant to the Department's request and allegation that it had not received copies, copies of the following Requests for Determination were sent: Docket Nos. 87-022, 88-001, 88-004, and 88-007.)

Based on the above facts, OAL finds that the Requester has satisfied all the filing requirements for this Request for Determination, and the Department's request that "the Request should not be considered at this time" must be denied.

(See Agency's Response, pp. 1-2; letter, dated October 17, 1987, from Requester to OAL; and letter dated July 6, 1988, from OAL to the Department.)

46 Operations Plan No. 6, II., A., dated January 1987.

47 Operations Plan No. 35A, II., A., dated February 1987.

48 Operations Plan 35B, II., A., dated March 1987.

49 Operations Plan No. 100, II., A., dated August 1986.

50 Agency's Response, p. 1.

51 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

52 Even if the Alcala injunction is no longer in force, the decision of the Marin Superior Court is entitled--even if informally--to some degree of deference, as a case which decided precisely the point at issue here. We note also that both parties were represented by counsel in Alcala.

53 Presumably if the Department had concluded that the December 1984 order had been terminated, it would have acted to formally correct the "note" purusant to the OAL regulation

governing "changes without regulatory effect." This regulation, Title 15, CCR, section 100, specifically lists changes to "authority" and "reference" citations as changes typically deemed to be without regulatory effect. OAL must act on these "nonsubstantive change proposals" within 30 days of submission; no public notice or comment is required.

54 The following are examples of provisions in OP No. 6, Part VI, which repeat provisions from Chapter 4600 of the Department's Administrative Manual, dated 11-7-84. Material that is double-underlined in OP No. 6 has been determined to be not a "regulation" by OAL. We have not re-evaluated for compliance with the APA any material previously found by the courts to be regulatory, i.e., all of Chapter 4600.

Example No. 1: OP No. 6, Part VI, Section M, "Handicraft"

"Inmate handicraft materials may be stored in the inmate's cell/living area, subject to the six cubic foot limitation. Value of the combined handicraft materials, supplies, and/or finished products in the cell/living area shall not exceed $200 (Claims of excess of $200 for lost or damaged handicrafts shall not be honored). Only inmates enrolled in the institution's handicraft program are authorized to participate in handicraft activities. All inmates enrolled in the Handicraft Program shall display in their cell/living area a current inventory of all tools and supplies.

"CMF inmates enrolled in the CMF Hobby Shop Program may also store handicraft materials in lockers located in the Hobby shop (accessible during Hobby Shop hours). Materials stored in the Hobby shop are not subject to limitations of six cubic feet or $200. However, upon transfer, all handicraft items which exceed six cubic feet shall be turned in to the Hobby Shop Manager/Supervisor for inventory and shipment at the inmate's expense."

Department's Administrative Manual, Chapter 4600, section 4614, "Handicraft"

"All handicraft materials in the inmate's cell, living area or which shall be transferred to another institution are subject to the six cubic foot limit. Value of combined handicraft materials, supplies and/or finished products in the cell or living area shall not exceed $200 (no claim for damaged or lost handicraft, which exceeds $200, shall be honored). Inmates shall not participate in hobby activities unless enrolled in the institution's handicraft program. The inmate shall keep on display in his/her cell or living area a current

inventory of tools and supplies. Upon transfer, all handicraft which exceeds the six cubic foot limit shall be shipped at the inmate's expense."

Example No. 2: OP No. 6, Part VI, Section N, "Legal Materials"

"Legal materials are subject to the six cubic foot personal property limit. The inmate's own trial transcripts, legal pleadings, legal personal notes, and attorney/client communications in excess of the six cubic foot limit shall be retained at the inmate's request in his un-issued personal property, stored in an area within the Program Housing Unit. The Unit-Housing Property Room shall be secure, and accessibility controlled by the Unit Program Sergeant only. Inmates shall be permitted access to these materials for the purpose of exchanging such papers with those retained in the inmate's living quarters at least twice weekly. To initiate the exchange the inmate will submit a written request to the Program Unit Sergeant. The request should include the inmate's work assignment, RDO's, and work hours. The Program Sergeant will personally supervise the exchange in accordance with the Work Incentive Program and insure the confidentiality of all legal materials stored in the Unit Program Property Room. Personally owned books/pamphlets or copies of published court opinions shall not be stored. Such materials shall be donated to the library, sent to a person designated by the inmate, or destroyed, whichever the inmate prefers. Legal paperwork used by one inmate to assist another may be in the possession of either inmate with the permission of the owner."

Department's Administrative Manual, Chapter 4600, section 4612, "Legal Material"

"Legal materials are subject to the six cubic foot limit. The inmate's own trial transcripts, legal pleadings, legal research notes and attorney-client communications in excess of the six cu.ft. limit shall be retained at the inmate's request in his/her unissued personal property. Inmates shall be permitted access to stored legal materials for the purpose of exchanging such papers with those retained in the inmates' living quarters no less than two times per week. Personally owned law books/pamphlets, or copies of published court opinions shall not be stored. Such material shall be donated to the library, sent to a person designated by the inmate or destroyed, whichever the inmate prefers."

Example No. 3: OP No. 6, Part VI, Section P,

"Organization Membership Cards"

"Inmates will be permitted to retain membership cards in civic[,] social, benevolent and professional organizations and associations in their possession at the time of their reception or are subsequently received by mail. This shall not apply for credit cards, payment cards, or membership cards for organizations that presents a threat to the security of the institution; nor does it imply any endorsement of the organization's or association's policy, acitivities [sic], or interest of its membership."

Department's Administrative Manual, Chapter 4600, section 4615, "Organization Membership Cards"

"(a) Inmates shall be permitted to retain membership cards in civic, social, benevolent, and professional organizations and associations which are in their possession upon arrival at the reception center or are subsequently received by mail.

"(b) This policy shall not apply to credit cards; payment cards; or membership cards for organizations with a history of involvement in activities which threaten the security of the institution or seek to promote 'hate' propaganda; nor does it imply any endorsement of an organization's recognition, policy, or activities and interests of its membership."

Example No. 4: OP No. 6, Part VI, Section S, "Inmate Property Complaints and Appeal Process"

"An inmate/parolee who feels the state is responsible for the loss or damage of his personal property shall attempt to resolve the matter with staff on duty when the loss or damage was discovered. If the problem cannot be resolved, the inmate/parolee may submit a CDC-602 (Inmate Appeal) as provided in Chapter 7300 of the Administrative Manual.

"Claims of $100.00 or less will require appeal through the Second Level of review. Claims between $100.00 and $200.00 will require appeal through the Third Level of review (the Director's Level).

"If these claims are approved, the claims will be paid by the institution Business Services Division after the inmate has signed a release absolving the State of any further liability in the matter.

Department's Administrative Manual, Chapter 4600, section 4640, "Property Complaints"

"An inmate/parolee who feels the State is responsible for the loss or damage of his/her personal property shall attempt to resolve the matter with staff on duty when the loss or damage was discovered. If the problem is not resolved, the inmate/ parolee may submit an appeal as provided in Chapter 7300 of this Manual."

Example No. 5: OP No. 6, Part VI, Section T, "Board of Control Claims"

"Policy Statement and Procedure for Claims Against the State:

1. The Board of Control will not act on such property claims until departmental administrative remedies have been exhausted. This means that they will not hear property claims unless an appeal has been filed on a CDC 602 Form, and that it contains a third level (Director's) response, granting or denying recommendations. Board of Control Form BC-1E (Rev. 2/78) must be used. Property claims filed directly with the Board of Control will be returned with no action, to the inmate/parolee with the instructions related to the proper submittal procedure.

2. Central Office will be responsible for the coordination of third level appeals and Board of Control claims. The Business Services Office will execute these responsibilities.

3. Inmate/parolee appeals and Board of Control Claims (hereinafter referred to as appeal packages) that are denied at the third level will be returned directly to the inmate/parolee with a copy to the Warden/Superintendent and Appeals Associate. The inmate/parolee will be advised that he may then file the claim directly with the Board of Control if he wishes. So that the Board of Control will be able to decide on the claim without having to refer it again to the department, the inmate/ parolee will be requested to submit the entire appeal package.

4. Those appeal packages for which the Director is recommending approval will be forwarded by Central Office to the Board of Control.

5. If the Board of Control denies the appeal package, it will be returned directly to the inmate/parolee with a copy of that action to Central Office. Central Office will notify the Warden/Superintendent and the Appeals Associate.

6. If the Board of Control grants the appeal package, and the dollar amount as recommended by the third level review is $100 or more, it will be included in the legislative claims (Omnibus) bill. If granted by the legislature [sic] and signed by the Governor, the bill will provide the Board of Control with the authority to pay the claim directly to the inmate/parolee after the required release form is submited [sic] by the inmate/parolee.

7. If the Board of Control grants the appeal package and the dollar amount is less than $100, the Board of Control, as provided by Government Code, Section 965, will authorize the department to pay the claim. Central Office will secure from the department [sic] of Finance the required Certification of availability of funds. The institution where the appeal package was filed will be authorized to pay the claim. Before payment is released, the inmate/parolee must sign a release absolving the State of further liability. The original will be maintained in the accounting office and the inmate/parolee will receive a photcopy [sic]. The relase [sic] form to be used is contained in this section and should be reproduced locally. Payment of claims filed by parolees will be handled on a case by case basis."

Department's Administrative Manual, Chapter 4600, section 4641, "Board of Control Claims"

"(a) The Board of Control will not consider an inmate's property claim unless an appeal has been filed on CDC Form 602 and it contains a third level (Director's) grant or denial. Board of Control Form BC-1E (Rev. 2/78) shall be used. Property claims filed directly with the Board of Control will be returned, without action, to the inmate/parolee with instructions for proper submission of the claim.

"(b) The Chief, Inmate/Parolee Appeals shall coordinate third level appeals and Board of Control claims.

"(c) Inmate/parolee property appeals and Board of Control claims (property appeal packages) denied at the third level shall be returned directly to the inmate/parolee, with copies to the Warden/Superintendent and the Appeals Coordinator. The inmate/parolee shall be advised that he/she may then file the claim directly with the Board of Control. The inmate/parolee shall be instructed to submit that entire property appeal package so the Board of Control can decide on a claim, without referring it back again to the Department.

"(d) Property appeal packages for which the Director recommends approval shall be forwarded to the Board of Control by the Chief, Inmate/Parolee Appeals.

"(e) If the Board of Control denies the claim, it shall be returned directly to the inmate/parolee with a copy of that action to the Chief, Inmate/Parolee Appeals, who shall in turn notify the Warden/Superintendent and Appeals Coordinator.

"(f) If the Board of Control grants the claim and the amount is $100 or more, it will be included in the Legislative Claims (Omnibus) Bill. When passed by the Legislature and signed by the Gorernor [sic], the Bill provides the Board of Control with funding to pay the claim directly to the inmate/ parolee after the required CDC Form 813, Release (Attachment "A"), is obtained from the inmate/parolee.

"(g) If the Board of Control grants the claim and the amount is less than $100:

(1) The Board of Control will authorize the Department to pay the claim.

(2) The Administrative Services Division shall secure from the Department of Finance the required certification of availability of funds.

(3) The institution where the property appeal package was filed shall be authorized to pay the claim. Before payment is released, the inmate/parolee shall sign a CDC Form 813 absolving the State of any further liability.

(4) The original release form shall be maintained in the accounting office and a copy shall be given the inmate/parolee.

(5) Payment of parolee claims awarded shall be handled on a case-by-case basis.

(6) Adequate supplies of CDC Form 813 shall be maintained by reproduction of the form locally."

55 Some of the provisions, standards or limitations stated in Chapter 4600, section 4611 may also be found in the Approved Personal Property lists attached to Operation Plan No. 6 and in Operation Plan No. 35B. For example:

Operation Plan No. 6
Approved Personal Property

TYPEWRITER [Portable]
NON-ELECTRIC OR ELECTRONIC PORTABLE. NON-ELECTRIC VALUE NOT TO EXCEED $200.00. ELECTRONIC PORTABLE NOT TO EXCEED $350.00 MUST BE SHIPPED DIRECTLY FROM VENDOR OR SPECIAL CANTEEN PURCHASED.

RINGS [1 ONLY]
NO SETS OR STONES. $100 MAXIMUM VALUE.

THROW RUG
DIMENSIONS NOT TO EXCEED 24" X 60". . . . CANTEEN PURCHASED. FIRE RETARDANT. NO SHAG, BRAID TYPE, OR DECORATED FRINGE TYPE. TO BE USED ON FLOOR ONLY!

(OP No. 35B, Part VI, sections B. 1. g. and C. 1. e. both provide the following:
Rug: One each, not to exceed 24" x 60" . . . .

Chapter 4600, section 4611
Property Allowed After Reception Processing

(e)(5) Typewriter.
Non-electric or electronic portable. Value (non-electric) not over $200; value (electronic portable) not over $350. Shall be purchased through special canteen or ordered and shipped direct from approved vendor.

(g)(2) Ring.
One; band-type only; no sets/stones . . . ; value (male or female) not over $100. . . .

(m)(1) Miscellaneous:
Throw rugs; dimensions not over 24" x 60"; purchased from canteen; fire retardant. No shag, braid, or decorative fringe-types; for use on floor only. . . .

56 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

57 "Interviews" are defined in Manual sections 1.301 and 5.001.

58 137 Cal.App.3d 736, 737.

59 Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal. Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.

60 Stoneham I also stated that "such uniform substantive proposals contained in administrative bulletins designed to implement the classification system must be promulgated in compliance with the [APA]." (Emphasis added.) 137 Cal.App. at 738, 188 Cal.Rptr. at 136.

61 Hillery, Stoneham II, and Faunce. See notes 37 and 59.

62 According to Procunier, cited supra in note 27, 33 Cal.App.3d at pp. 261-262, 109 Cal.Rptr. at p. 28, the basic purposes of the APA are to:

> "provide in the context of a multi-agency control and supervision over widely varied business and professional enterprises and activities a standard and uniform procedure whereby those affected by the controls may be heard; and second, to provide a repository accessible to the public in which general administrative rules and regulations may be found, thus avoiding secrecy."

Though Procunier was largely overturned by the 1975 amendment to Penal Code section 5058, the case may be deemed to have some continuing vitality in context of institutional rules. That is, there is no evidence that the Legislature intended that those most directly affected by "local" rules were to be consulted prior to the adoption of such rules. Further, since the institutional rules are made available to inmates, there is no "secrecy" problem.

The Lackner court (case cited in note 16, supra) stated that the two primary APA goals were meaningful public participation and effective judicial review. We conclude that affording prisoners the opportunity to comment on statewide rules adequately satisfies the public participation goal, and that it would be unduly burdensome to require elaborate documentation in the form of a rulemaking record for local rules. Wardens should be encouraged to set clear guidelines, not impeded from doing so.

63 According to the California Attorney General, the Legislature intended "to confer self-governing, quasi-independent status [on] the prisons and correctional institutions, and the wardens and superintendents of those facilities are granted powers akin to those granted local governments. See 7 Ops.Cal.Atty.Gen 15 (1946); Penal Code § 2086." Command Responsibilities at Correctional Institutions, 55 Ops.Cal.Atty.Gen 164, 170 (1972).

64 In re French (1980) 106 Cal.App.3d 77, 164 Cal.Rptr. 800 (local practice inconsistent with CCR provision).

65 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances, but only subdivision (a), below, applies to parts of the challenged Operation Plans in the case at hand:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.) The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL, 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $50.

66 We wish to acknowledge the substantial contribution of Unit Legal Assistant Annemarie H. Starr in the preparation of this Determination.